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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 276

RAYMOND HOPKINS,

Petitioner,

vs.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 21, 1967.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Raymond Hopkins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the case of Raymond Hopkins *vs.* John W. Gardner as Secretary of Health, Education and Welfare, No. 15724 in that Court on March 15 1967.

OPINIONS BELOW.

The opinion of the District Court is unreported and appears as Appendix A at p. 1a. A subsequent opinion of the District Court (the relevant one here) dated March 14, 1966, is unreported and appears as Appendix B at p.

10a. The opinion of the Court of Appeals for the Seventh Circuit has been reported at 374 F. 2d 726 and is Appendix C at p. 13a.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered March 15, 1966. A timely motion for rehearing was denied April 21, 1967. (See Appendix D at p. 21a.) A stay of the issuance of the mandate of the Court of Appeals has been granted by that Court, conditioned on the filing of a petition for certiorari by June 22, 1967. This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1254(1). The basis of the jurisdiction of the District Court was 42 U. S. C. 406(b)(1) and 42 U. S. C. Sec. 405(g).

QUESTIONS PRESENTED.

The amount of attorney fees allowable to a claimant's attorney by the District Court under 42 U. S. C. 406(b)(1) as amended by Section 332 of the Social Security Amendments of 1965, 79 Stat. 403; whether such fee should be based on the benefits of the claimant alone or on the benefits of the claimant and the other dependent members of his family.

STATUTORY PROVISION INVOLVED.

Section 206(b)(1) of the Social Security Act, 42 U. S. C. 406(b)(1) as amended by Section 332 of the Social Security Amendments of 1965, 79 Stat. 403 which provides in pertinent part:

> "(b)(1) Whenever a court renders a judgment favorable to a claimant under this sub-chapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to

which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment of such representation except as provided in this paragraph."

STATEMENT.

This case commenced in the District Court on July 2, 1964 as an appeal to reverse the decision of the Secretary of Health, Education and Welfare that Raymond Hopkins was not totally and permanently disabled within the provisions of the Social Security Act. The District Court reversed the Secretary on September 30, 1965. (See Appendix A.) Thereafter on March 14, 1966, the District Court awarded claimant's attorney a fee of 25% of the benefits accruing to the *claimant alone.* (See Appendix B.) An appeal from this order was taken to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in an opinion reported at 374 F. 2d 726. (See Appendix C.) The Seventh Circuit limited the term "claimant" in the Social Security Act above cited to the applicant alone excluding any dependent members of claimant's family. Two opinions of the United States Court of Appeals for the Fourth Circuit are squarely opposed to this interpretation of the Seventh Circuit. The Fourth Circuit so decided on May 12, 1966 in the cases of *Redden* v. *Celebrezze,* 361 F. 2d 815 and *Lambert* v. *Celebrezze,* 361 F. 2d 679, rehearing denied in both cases at 370 F. 2d 373 on December 8, 1966. The opinion of the Fourth Circuit *en banc* on rehearing is an excellent, in depth, discussion of the applicable section of the Social Security Act. At p. 374 Chief Judge Haynsworth speaking for the court stated:

"Section 332 of the Act[1] authorizes the Court in such cases to fix and allow a reasonable fee for services rendered to such a claimant in judicial proceedings, but provides that no such fee may exceed 'twenty-five per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.' The Secretary is authorized to pay a fee so allowed directly to the attorney out of the benefits otherwise payable to his client, and the attorney is prohibited from charging more.

"The provision for judicial determination of the fee and the insertion of a statutory maximum was prompted by reports that exorbitant fees had been charged and collected by lawyers representing claimants of Social Security benefits in the federal courts,[2] but we find nothing in the legislative history of the statute which enlightens us concerning the congressional intention expressed in the words 'past-due benefits to which the claimant is entitled by reason of such judgment.'

"The words are susceptible of a narrow, literal interpretation which would limit the fee basis to the accrued benefits payable to the claimant on his own behalf, excluding entirely the benefits payable on the claims of dependents. Some members of the Court are inclined to read the statute that way. A majority, however, reads the statute more broadly.

"To place the problem in focus, we may refer to the *Redden* case as illustrative. Redden, claiming physical incapacity for any work, filed a claim for disability benefits on his own behalf. He also filed an application for insurance benefits for his seven children, and, in that application, he is listed as the applicant. While any benefits received by him pursuant to that application would be for the support and maintenance of his children, he is still the applicant in a literal and substantive sense. His wife, as applicant, filed a separate application for benefits to a wife of a

1. 42 U. S. C. A. § 406(b).

2. See S. Rep. 404, 89th Cong. 1st Sess. 422.

disabled insured individual. Any benefits payable on that application, of course, would be paid directly to the wife, but would, within an active family unit, inure to the benefit of the husband substantially to the same extent as if they were paid directly to him.

"The interdependence of the claims is readily apparent in the Act, itself. Their interrelation provides an overall family benefit measurable in part by the number of dependent family members. Under 42 U. S. C. A. § 402, a wife of a disabled insured husband is not entitled to benefits if she is under the age of 62 and has no children who are under the age of 18 and entitled to benefits. A child is entitled to benefits only if under the age of 18 and dependent for normal support upon the insured parent. Section 403 provides maximum limitations upon the overall family benefits. To that extent, they are clearly lumped together. Moreover, under § 405(b) after an administrative decision, a dependent has a right to become a formal party to the administrative proceedings and to a hearing, and, under § 405(g), any such dependent who becomes a party to the administrative proceedings has a right to obtain judicial review of the primary claim of the insured individual.

"In the absence of particularized questions of the qualification of a dependent claimant, his age or his relation to or dependence upon the insured individual, all of the claims are of a part. In these cases, and in the usual disability insurance case, the only real issue is the disability of the insured individual. Once that is established, allowance of the claims of the other qualified members of the family is substantially automatic. Surely the primary claimant's interest is not limited to the benefits which will be payable upon his primary claim, for, as long as he is a member of the active family unit, his interest will extend without diminution to all of the interrelated family benefits allowable to him and to his dependents.

"With these factors in mind, we do not think the words 'past-due benefits to which the claimant is entitled by reason of such judgment' can be limited to

the benefits payable on the primary claim. As we have seen, the claimant, Redden, is, in fact, the claimant for his children's benefit, as well as those payable on the primary claim. Those benefits will be payable to him as a result of a judgment in his favor on the primary claim. Though allowance of the dependent claims in this instance would be by administrative action following the judgment, the allowance and the payments will be the direct consequence of the judgment.[3] If Redden is literally the claimant with respect to the benefits of the children so that their accrued benefits would be included in the base of the computation of the fee, it would seem an arbitrary thing to exclude the wife's benefits from the base in light of the statute's concern with the family as a unit and the close interrelation of the three claims.

"If Congress had intended the fee base to be limited to benefits payable on the primary claim, it would hardly have provided the means for its universal avoidance. The lawyer, seeking a larger fee, in every case could make the dependents parties to the administrative proceeding and parties to the judicial proceeding. With all claimants before the court, the limitation of § 406(b)(1) could not be confined to the benefits payable to one claimant only.

"For these reasons, we think the statutory words 'past-due benefits to which the claimant is entitled by reason of such judgment' mean the entire group of benefits payable to the primary claimant on his own behalf and to him and other dependent members of his family on their behalf."

No petition for a writ of certiorari has been filed in the *Redden* and *Lambert* cases and the time for such has now lapsed. On July 8, 1966, the United States District Court for the Western District of Virginia in the case of *Blankenship* v. *Gardner*, 256 F. Supp. 405, interpreted this section of Social Security Act the same as the Fourth Circuit in

3. We assume, of course, the absence of any question that the children listed by Redden are his and are dependents.

Redden and *Lambert*. The case of Sims *vs.* Gardner was decided contra to *Redden, Lambert* and *Blankenship* by the United States District Court Eastern District of Tennessee on June 13, 1966, reported 255 F. Supp. 825 which has been appealed to the United States Court of Appeals for the Sixth Circuit, No. 17356 pending, and was argued April 12, 1967 and at the time this brief is written no decision has been reported. Also on this subject is *Mircale* v. *Celebrezze* (6th Cir. 1966), 351 F. 2d 361 the same question is touched on very superficially.

REASONS FOR GRANTING THE WRIT.

These conflicting decisions present an impairment to the uniform and proper administration of the Social Security Act and should be resolved by this Court. This is of substantial moment to secial security claimants, the bar, and those charged with administering the Social Security Act.

CONCLUSION.

This court should grant this writ of certiorari to resolve this conflict.

Respectfully submitted,

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June 21, 1967.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana,
Hammond Division at Lafayette.

Raymond Hopkins, *Plaintiff*, *vs.* Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, *Defendant.*	Lafayette Civil No. 282.

ORDER AND MEMORANDUM OF DECISION.

This matter is now before the court for disposition on cross motions for summary judgment filed by the defendant April 26, 1965, and by the plaintiff May 6, 1965. Judgment must be entered in favor of the plaintiff.

This action is an appeal to review the determination of the Hearing Examiner, acting under the authority of the Secretary of Health, Education, and Welfare, that the plaintiff's disability insurance benefits were properly discontinued as of December 31, 1962, under the Social Security Act, 42 U. S. C. § 425. Review in this court, authorized by 42 U. S. C. § 405(g), is limited to questions of law involved in the Secretary's determination and to a con-

sideration of whether the Secretary's findings of fact are supported by substantial evidence in the record.

The plaintiff, an operator of power cranes and drag lines, was granted disability insurance benefits under the Social Security Act after he became unable to work on August 26, 1960 at the age of 52. The benefits became effective as of March 1961 and were terminated as of December 1962 on a determination by the Secretary that plaintiff was no longer "disabled" under the provisions of the Act. The termination of benefits was affirmed upon reconsideration. The plaintiff requested a hearing, which was held October 9, 1963. The Hearing Examiner affirmed the prior determination and the Appeals Council denied plaintiff's request for review on May 6, 1964. This timely appeal is taken from determination of the Hearing Examiner, which is also the final decision of the Secretary of Health, Education and Welfare.

The crucial question on review by this court is whether there is substantial evidence to support the finding that plaintiff's disability has ended. "Disability" is defined by the Act as "inability to engage in any substantial gainful activity by reason of any medically determinable physical . . . impairment which can be expected . . . to be of long-continued and indefinite duration." 42 U. S. C. § 423(c)(2). Judge Friendly, writing for the court in *Kerner* v. *Flemming*, 283 F. 2d 916, 921 (2d Cir. 1960), stated the issues involved in a determination of disability under this section:

> "Such a determination requires resolution of two issues—what can applicant do, and what employment opportunities are there for a man who can do only what applicant do? Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."

In reversing the district court's affirmance of the Secretary's determination in a case similar to the instant case,

Judge Brown, writing for the court in *Butler* v. *Flemming*, 288 F. 2d 591, 595 (5th Cir. 1961), stated that the test of availability of employment within the applicant's competence was whether the evidence on the record contained "any indication of any specific work less exacting (than the work from which he is now foreclosed) within his residual competency and reasonably available as a prospective source of employment in the general area where he lives."

The exhibits at the hearing in the instant case included reports and letters from five doctors who had examined the plaintiff. The reports of two of the doctors were presented to the Department of Health, Education, and Welfare before the plaintiff was declared to be disabled and were the reports of the doctors who were treating the plaintiff as a patient. The reports of the other three doctors were presented after the original award and were made by doctors solely for the purpose of ascertaining whether or not the plaintiff's disability continued. These reports establish that the plaintiff became disabled by reason of a ventral hernia resulting from a gall bladder operation. Four attempts were made to repair the hernia, which is about the size of a human fist. An examination in February 1963 revealed that it exuded a "serum" that was apparently of superficial origin. In December 1963, Dr. Nelson stated that further attempts to repair the hernia would probably be futile and that improvement was unlikely. The Plaintiff has other physical difficulties, including almost complete blindness in his left eye.

The plaintiff has worked as a power crane or drag line operator in strip mines all his life except at one earlier time when he did some farm work. Plaintiff's testimony that he is unable to do farm work in his present condition is uncontradicted in the record. He has a seventh grade education and can read, write, and do simple arithmetic, although plaintiff testified he is not very good at arith-

metic. Joseph Ganns, a vocational rehabilitation expert, testified at the hearing that the plaintiff is "limited in transfer of skills."

While the general burden of proving disability is upon the applicant, he is not required to "go down the list and verbally negative his capacity for each (industrial occupation) or their availability to him as an actual opportunity for employment." *Butler* v. *Flemming, supra,* at 595. The record in the instant case contains evidence of the possibility of plaintiff finding employment in only three job areas. This does not include farming, which the record indicates without contradiction is not within applicant's competency. The plaintiff, according to Mr. Gann's evaluation, might be able to work as a truck driver or, if the medical conclusions of Dr. Levin are correct, at his former job as a crane operator if the lever controls are powered by more modern methods of electricity or air. The Hearing Examiner seemed to consider that plaintiff might also be able to drive a taxi, although Mr. Ganns declined to endorse that proposition.

Mr. Ganns' testimony that plaintiff might be able to drive a truck is not based on plaintiff's physical capabilities, but on a study of the transferability of skills of a person who has formerly been a crane operator. There is no evidence in the record that plaintiff is physically capable of driving a truck or a taxi. Likewise, there is no evidence that any such employment opportunities are reasonably available to a person with an unrepairable hernia as serious as that suffered by this plaintiff. Such jobs are generally accompanied by the lifting of the truck's cargo or the luggage of taxi passengers, the opening of taxi doors that requires much awkward reaching, and other physical exertions beyond the competency of this plaintiff. The Hearing Examiner cannot stretch inferences so far that evidence of transferability of skills can support a conclusion of

physical competency. There was no evidence that a transferability of skills exists from operating a crane to driving a taxi.

Nor is this court favorably impressed, to put it mildly, with the reasonableness of suggesting that a man who is blind in one eye should be asked, or even allowed, to seek employment as a truck driver or a taxi driver. There certainly is no evidence in this record to indicate that such a man is reasonably likely to find an employer willing to hire him as a truck or taxi driver. The vision requirements for obtaining a public passenger chauffeur's license from the State of Indiana almost certainly could not be met by a one-eyed man. The court finds that there is no evidence whatsoever to support the Hearing Examiner's finding that plaintiff has any practical opportunity to find employment driving a truck or a taxi.

If the Hearing Examiner's determination is to stand, it must rest on the reasonable availability to the plaintiff of employment in his former line of work. The Examiner's conclusion that such employment is available and within plaintiff's competency must rest upon the reports of Dr. Stanley Levin, an expert in internal medicine, and upon the testimony of Mr. Ganns. The record contains no other evidence to support such a conclusion.

It is significant that Dr. Levin nowhere states in his reports that plaintiff is capable of engaging in his former regular work. He does say it is his opinion that plaintiff can operate a crane, but only "if heavy exertion is not required to move the levers." The only evidence on the amount of exertion required is plaintiff's statement that pulling levers on a crane involved much more physical effort than shifting gears in a car, and the testimony of Mr. Ganns that operating levers in a "modern" crane required no more than fifteen pounds of arm pressure. The fact that plaintiff can operate an automobile gear shift

for short trips to town and back, or even that he is capable of pushing and pulling the levers on a "modern" crane does not support a finding that he can operate a crane. There is no evidence in the record indicating the capacity of plaintiff's arm pressure unless it is Dr. Levin's report that plaintiff cannot lift anything weighing more than five or six pounds. There is no evidence that Dr. Levin had ever moved the lever of a power crane or knew how much pressure was required to move one, and his opinion that plaintiff should be able to "operate levers" is not a substantial basis for the Examiner's conclusion that plaintiff was physically capable of operating the levers of a power crane as a full-time occupation. "Satisfaction of the claimant's statutory obligation to show that he is not able to do any substantial work is to be judged in a practical way." *Ratliff* v. *Celebrezze,* 338 F. 2d 978, 983 (6th Cir. 1964); *Kerner* v. *Flemming, supra.* The test for determining an applicant's competency and the availability of work, as stated by Judge Sobeloff, requires that the availability and the nature of the work be judged "in the light of what is reasonable and not of what is merely conceivable." *Thomas* v. *Celebrezze,* 331 F. 2d 541, 546 (4th Cir. 1964). On this record there is no evidence that plaintiff can reasonably work a power shovel on a full-time basis, or that there is any practical likelihood that he could find an employer willing to hire someone with all of plaintiff's physical limitations.

Dr. Levin reported that plaintiff "will not be able to do any bending beyond that ordinarily associated with sedentary occupation." The Examiner himself conceded at the hearing that a crane operator has to do some bending. Plaintiff's testimony is unchallenged that the lifting of cables is sometimes involved and that there are times when a crane operator may have to climb around on the machine to do repair work. Such activities are admittedly beyond

plaintiff's physical competency. Dr. Levin reported that plaintiff could not do climbing "which would require a moderate amount of strain." The Hearing Examiner suggested that plaintiff could use a ladder to climb the eight feet up to the crane once in the morning, and down again at night, as a means of circumventing plaintiff's lack of ability to climb onto the crane in the ordinary way. Neither the plaintiff nor Mr. Ganns had any idea whether an employer would object to the inconvenience that would be caused by such a method. Plaintiff agreed that he might be able to work levers and that he could climb up and down the proposed ladder once a day, but protested that there was much more to the job than those two operations. His testimony about the nature and details of the work is unchallenged throughout the entire record. A work activity report filed by a claims representative for the Secretary, and which is one of the exhibits in the record, describes plaintiff's inability to lift anything or to be "climbing around shovel and rig" as factors that have an effect on the quality of plaintiff's work as a crane operator. The same report stated that plaintiff "had to use hands and feet to control levers and operate shovels (diesel and compressed air) for controls and brakes." Mr. Ganns' testimony that plaintiff could "probably" operate the levers on "modern cranes" and climb up and down once a day and that plaintiff's ability to operate the levers depended on the body position is too speculative to support a finding that the plaintiff could reasonably and practically find and engage in work of this nature in view of his physical limitations. "There must be something more tangible establishing what employment opportunities there are for a man with his impairment." *Stancavage* v. *Celebrezze*, 323 F. 2d 373, 378 (3d Cir. 1963). "A theoretical ability to so engage is not enough if no reasonable opportunity is available." *Celebrezze* v. *Warren*, 339 F. 2d 833 (10th Cir. 1964).